

Commission has previously determined, the greatest value of a carrier's flexible access to its own records when selling the services it is permitted to sell is found in the carrier's ability to offer efficient customer service and true "one-stop shopping" for those services.<sup>42</sup> Thus, where Congress intended Section 272(g) and 271(e)(1) to operate in tandem "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services,"<sup>43</sup> and where this Commission has concluded that BOCs with 271(d) relief have the same opportunity to engage in the same type of marketing as any other service provider, it would be incongruous for the Commission to conclude that CPNI is not an essential element of a BOC's permitted marketing activities or to impose rules that hamper a BOC's use of CPNI in those activities. Accordingly, it would be error for the Commission to encumber a BOC's use, disclosure, or access to CPNI for statutorily permitted purposes by determining that a BOC's solicitation of approval for those permitted uses is not itself included within the marketing authority granted by Congress.

**9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services ... concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any ... services ... or information concerning its provision of exchange access to [its affiliate] unless such ... services ... or information are made available to other providers of interLATA services in that market on the same terms and conditions"?**

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<sup>42</sup> *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*; 6 FCC Rcd 7571, 7610 (1991) ("BOC Safeguards Order"), *aff'd in part, vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("California III"), *cert denied*, 115 S. Ct. 1427 (1995).

<sup>43</sup> *See, e.g., Non-Accounting Safeguards Order*, at n. 715, *citing and paraphrasing* S. Rep. No. 104-23, 104th Cong., 1st Sess. 43 (1995).

The phrase “information concerning [a BOC’s] provision of exchange access” in Section 272(e)(2) does not include CPNI as defined in Section 222(f)(1).<sup>44</sup> The information to which Section 272(e)(2) refers is information about the nature of exchange access service itself and the manner in which it is provided by the BOC -- information that may be relevant to an unaffiliated entity’s request for such service pursuant to the preceding Section 272(e)(1). Indeed, if Section 272(e)(2) referred to CPNI, it would be at odds with Section 222 which leaves up to the customer about whom such information relates the decision whether the information is to be shared with a nonaffiliate. If CPNI were included under Section 272(e)(2), that section would operate contrary this customer prerogative by requiring public availability of the information even if the customer chose only to disclose it to the BOC’s affiliate. The Commission should avoid a reading that creates a such a conflict within the Act when an alternative, internally consistent reading is available.<sup>45</sup>

**10. Does a BOC’s seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a “transaction” under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?**

A BOC contacting its customers to seek approval to use CPNI to engage in activities in which the BOC is permitted to engage is not performing a service for or on behalf of its Section 272 affiliate, but for itself. Accordingly, no “transaction” under 272(b)(5) has occurred.

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<sup>44</sup> The reference in Section 272(e)(2) to “services” similarly is unrelated to any CPNI approval solicitation process.

<sup>45</sup> At most, the reference to “information about [a BOC’s] provision of exchange access” under Section 272(e)(2) is comparable to aggregate CPNI under Section 222(c)(3) for which a BOC already has a duty to make available when used outside a Section 222(c)(1) purpose.

Alternatively, the parent company of the BOC and the Section 272 affiliate or another BOC affiliate may canvass the customers of the BOC and other affiliates and perform other marketing functions, as long as the parent or other affiliate properly documents and apportions the costs incurred in doing so.<sup>46</sup> Again, however, such an arrangement is not between the BOC and its Section 272 affiliate, and therefore does not constitute a “transaction” under Section 272(b)(5).

**11. Please comment on any other issues relating to the interplay between sections 222 and 272.**

**12. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 272.**

The Commission need only affirm in whatever rules it adopts under Section 222 that those rules apply evenly to all carriers, including the BOCs, and that Section 272(c)(1) imposes no special CPNI burdens on the BOCs.

## **II. Interplay between Section 222 and Section 274**

### **A. Threshold Issues**

**13. To what extent, if any, does the term “basic telephone service information,” as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?**

Although there is some apparent overlap between “basic telephone service information” (“BTSI”) and CPNI, the two concepts are not identical. BTSI is defined to be network and customer information of a BOC and other information acquired by the BOC as a result of engaging in the provision of basic telephone service,<sup>47</sup> which is defined in turn to be wireline

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<sup>46</sup> *Non-Accounting Safeguards Order*, at ¶ 182.

<sup>47</sup> 47 U.S.C. § 272(i)(3).

service.<sup>48</sup> CPNI, in contrast, refers to certain types of information a carrier has about “telecommunications service” subscribed to by a customer.<sup>49</sup> Thus, while BTSI might be more limited by its reference to wireline service, it may be broader by its reference to “network and . . . other information” the BOC may have that might not be within any of the categories of the CPNI definition. The distinction, however, may be one without significance.

The Commission has determined that a BOC may team with an electronic publishing provider, including a separated affiliate, under Section 274(c)(2)(B) if the respective teaming participants market only their own services.<sup>50</sup> A BOC with appropriate approvals may use CPNI in all of its own marketing efforts pursuant to Section 222, and thus may use CPNI in its respective marketing activities in a teaming arrangement. To the extent information is BTSI, a BOC using the information for its marketing its own services under a teaming arrangement is using the information “as authorized by this section [274].”<sup>51</sup> Thus, the only limitation on a BOC’s use of its information to market its services under a teaming arrangement would be if the BOC did not have any necessary CPNI approval for that use. The BOC would still be able to use for that marketing purpose any BTSI that is not CPNI.

## **B. Using, Disclosing, and Permitting Access to CPNI**

### **(i) Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services**

**14. Does section 274(c)(2)(A) mean that a BOC that is providing “inbound telemarketing or referral services related to the provision of electronic publishing” to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available,**

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<sup>48</sup> 47 U.S.C. § 272(i)(2).

<sup>49</sup> 47 U.S.C. § 222(f)(1).

<sup>50</sup> *Electronic Publishing Order*, at ¶ 166.

<sup>51</sup> 47 U.S.C. § 274(c)(2)(B).

**on nondiscriminatory terms, to all unaffiliated electronic publishers who have requested such services? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

A BOC that is providing inbound telemarketing or referral services under Section 274(c)(2)(A) must do so on a nondiscriminatory basis. That does not require a BOC that is engaged in such activities with an affiliate, separated affiliate, or joint venture and that uses, access, or discloses CPNI in accordance with customer approvals pursuant to Section 222(c)(1) to make that CPNI available to third parties who request those services, unless such third parties also have appropriate customer approval under Section 222.

Moreover, Section 222(d)(3) provides that a carrier, including a BOC, that performs any inbound telemarketing or referral function may use, disclose, or permit access to CPNI for the purpose of such activities for the duration of the call and with customer approval. A BOC providing inbound telemarketing or referral services under Section 274(c)(2)(A) that does not disclose or permit access to CPNI by the affiliate, separated affiliate, or joint venture incurs no obligation to make CPNI available to unaffiliated electronic publishers.

**(ii) Section 274(c)(2)(B) -- Teaming or Business Arrangements**

**15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher" may use, disclose, or permit access to basic telephone service information that is CPNI in connection with that teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

A BOC may engage in nondiscriminatory teaming or other business arrangements with any electronic publisher. Yet, the Commission has determined that in such arrangements, the BOC can only market its respective services.<sup>52</sup> Thus, a BOC's use of CPNI to market its own services in a teaming arrangement creates no obligation to use, disclose, or permit access to CPNI by any electronic publisher with whom the BOC has no teaming arrangement.

**16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party, only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?**

A BOC marketing its own services pursuant to a teaming arrangement needs no affirmative written consent from the customer to use CPNI for that purpose. Nor does an affiliate or separated affiliate that is a member of the teaming or business arrangement need affirmative written consent. Similar to the discussion regarding Section 272, an informed notice and opt out approval mechanism is an appropriate means of validating customers' presumed expectations regarding a BOC's and its affiliate's use and sharing of CPNI. Once having validated that presumption, no further approval is required.

Nor should affirmative written approval be required for use, disclosure or access to CPNI by a teaming member that is not an affiliate of the BOC as long as such use, disclosure, or access is limited to the purpose of the teaming arrangement and as long as that purpose is within the scope of the notice of the BOC's intended use of CPNI. Although the teaming partner may not be a BOC "affiliate" under a given definition, customers' expectations regarding business's use of

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<sup>52</sup> *Electric Publishing Order*, at ¶ 166.

information are based on customers' perceptions of the business as an enterprise, not as individual entities and legal relationships. A BOC that discloses that customer information may be used in teaming arrangements with nonaffiliated participants should not have to obtain further written approval.

**(iii) Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures**

**17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?**

A BOC that is engaged in a joint venture activity to provide electronic publishing services should be permitted to use, access or disclose CPNI for the purpose of the joint venture activity without treating the joint venture as a third party for purposes of CPNI approval. For the reasons set forth above, a customer is not concerned with the legal niceties of the business structure of the business enterprise with whom they have a relationship. Adequate notice to the customer that the BOC may use CPNI in electronic publishing joint venture should, absent an opt-out response from the customer, constitute approval for the BOC to use and share CPNI for the purpose of the joint venture.

**C. Customer Approval**

**(i) Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services**

**18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on the forms of customer approval in connection with section 274(c)(2)(A) activities?**

A BOC's notice and opt out approval process is sufficient to achieve initial approval for use of CPNI in providing inbound telemarketing or referral services under Section 274(c)(2)(A). Any customer from whom the BOC does not have approval for access to CPNI for such purposes may grant such approval orally during the inbound call pursuant to Section 222(d)(3).

**19. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its separated affiliate or electronic publishing joint venture also offer to solicit that approval on behalf of affiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers when it provides such a service for its section 274 separated affiliates, electronic publishing joint ventures, or affiliates under section 274(c)(2)(A)? What impact, if any, does section 222(d)(3) have on the BOC's obligations under section 274(c)(2)(A) with regard to the solicitation of a customer's approval during a customer-initiated call? What specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 274 separated affiliates or electronic publishing joint ventures or affiliates over unaffiliated entities? If the customer approves disclosure to both the BOC's section 274 separated affiliates or electronic publishing joint ventures or affiliates and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 274 separated affiliates or electronic publishing joint ventures or affiliates?**

A BOC that canvasses its customers regarding their preferences with respect to the BOC's use or disclosure of records relating to the business relationship between the customer and the BOC is not providing an "approval solicitation service" to its Section 274 affiliate or any other affiliate. Rather, the BOC is fulfilling its own obligations under the Act to protect the confidentiality of the customer's information and to use, disclose, or permit access to the information only with its customers' approval. A BOC incurs no obligation to solicit its customers in support of its competitors' marketing efforts. The First Amendment prohibits the Commission from compelling a BOC to contact its customers and "speak" on behalf of



nonaffiliated entities.<sup>53</sup> Section 274(c)(2)(A) cannot be interpreted or applied to impose an unconstitutional burden on the BOCs. Accordingly, a BOC cannot be compelled to perform an “approval solicitation service” on behalf of nonaffiliates.

**20. To the extent that sections 222(c)(1) and 222(d)(3) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its section 274 separated affiliate, electronic publishing joint venture, or affiliate under section 274(c)(2)(A)? If, for example, a BOC may disclose CPNI to its section 274 separated affiliate pursuant to the customer’s oral or opt-out approval, is the BOC required to disclose CPNI to unaffiliated entities upon the customer’s approval pursuant to the same method?**

Under Section 222, a BOC, like any other telecommunications carrier, may use, disclose or permit access to CPNI to provision the service from which the information was derived (and other associated purposes under Section 222(c)(1)(B)) and, with customer approval, may use, disclose, or permit access to CPNI for any other purpose. The BOC, like any other telecommunications carrier, may rely on customers’ reasonable expectations of the carrier’s handling of CPNI, coupled with an informed notice and opt out mechanism to validate those expectations and to provide opportunity for exception, as a means of obtaining such approval. A BOC that utilizes a notice and opt out mechanism to obtain customer approval to disclose CPNI to a Section 274 affiliate is not required to utilize the same mechanism to obtain approval to disclose CPNI to a nonaffiliate.

Notice and opt out CPNI approval processes are an appropriate and efficient mechanism for obtaining a customer’s approval for action that is presumed to be consistent with the customer’s reasonable expectations. As the Commission has found on prior occasion and as the

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<sup>53</sup> *Pacific Gas and Electric Co. v. Public Utilities Comm’n*, note 38, *supra*.

present record confirms, customers generally expect a business with whom the customer has an existing relationship to share information about that relationship among affiliates of the business. Accordingly, notice and opt out procedures are an appropriate means of validating the presumption, while giving customers whose expectations differ from the norm an opportunity to protect their individual expectations.

Conversely, notice and opt out is an inappropriate means of obtaining customer authorization for activity that is presumed to be contrary to the customer's interest. Inherent in Section 222 is the presumption that customers prefer that their CPNI not be shared with entities not affiliated with the carrier. Indeed, Section 222(a) imposes the affirmative duty on all telecommunications carriers to protect the confidentiality of such information. Accordingly, a notice and opt out mechanism is an inappropriate tool for seeking authorization for information disclosure to entities unaffiliated with the carrier.

**(ii). Section 274(c)(2)(B) -- Teaming or Business Arrangements**

**21. Must a BOC, that is engaged in a teaming or business arrangement under section 274(c)(2)(B) with "any separated affiliate or with any other electronic publisher," obtain customer approval before using, disclosing, or permitting access to CPNI for such entities? What forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation?**

A BOC that is engaged in a teaming or other business arrangement to provide electronic publishing services should be permitted to use, access or disclose CPNI for the purpose of that activity without treating the teaming or other business arrangement as a third party for purposes of CPNI approval. For the reasons set forth above, a customer is not concerned with the legal niceties of the business structure of the business enterprise with whom they have a relationship.

Adequate notice to the customer that the BOC may use CPNI in a teaming or other business arrangement should, absent an opt-out response from the customer, constitute approval for the BOC to use and share CPNI for the purpose of that activity.

**22. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of any of its teaming or business arrangements under section 274(c)(2)(B) also offer to solicit that approval on behalf of other teaming arrangements and unaffiliated electronic publishers? That is, must the BOC offer an “approval solicitation service” to unaffiliated electronic publishers and teaming arrangements under section 274(c)(2)(B)? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its electronic publishing teaming or business arrangements over unaffiliated entities? If the customer approves disclosure to both the BOC’s electronic publishing teaming or business arrangements and unaffiliated entities, must a BOC provide the customer’s CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its electronic publishing teaming or business arrangements?**

A BOC that canvasses its customers regarding their preferences with respect to the BOC’s use or disclosure of records relating to the business relationship between the customer and the BOC is not providing an “approval solicitation service” to participants in teaming or other business arrangements. Rather, the BOC is fulfilling its own obligations under the Act to protect the confidentiality of the customer’s information and to use, disclose, or permit access to the information only with its customers’ approval. A BOC incurs no obligation to solicit its customers in support of its competitors’ marketing efforts. The First Amendment prohibits the Commission from compelling a BOC to contact its customers and “speak” on behalf of nonaffiliated entities.<sup>54</sup> Section 274(c)(2)(B) cannot be interpreted or applied to impose an unconstitutional burden on the BOCs. Accordingly, a BOC cannot be compelled to perform an “approval solicitation service” on behalf of nonaffiliates.

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<sup>54</sup> *Pacific Gas and Electric Co. v. Public Utilities Comm’n*, note 38, *supra*.

**23. To the extent that sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its teaming or business arrangements under section 274(c)(2)(B)? If, for example, a BOC may disclose CPNI to a section 274 separated affiliate with which the BOC has a teaming arrangement pursuant to the customer's oral or opt-out approval, is the BOC likewise required to disclose CPNI to unaffiliated electronic publishers or teaming arrangements upon obtaining approval from the customer pursuant to the same method?**

Under Section 222, a BOC, like any other telecommunications carrier, may use, disclose or permit access to CPNI to provision the service from which the information was derived (and other associated purposes under Section 222(c)(1)(B)) and, with customer approval, may use, disclose, or permit access to CPNI for any other purpose. The BOC, like any other telecommunications carrier, may rely on customers' reasonable expectations of the carrier's handling of CPNI, coupled with an informed notice and opt out mechanism to validate those expectations and to provide opportunity for exception, as a means of obtaining such approval. A BOC that utilizes a notice and opt out mechanism to obtain customer approval to disclose CPNI to a Section 272 affiliate is not required to utilize the same mechanism to obtain approval to disclose CPNI to a nonaffiliate.

#### **D. Other Issues**

**24. Does the seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 274 separated affiliate or electronic publishing joint venture constitute a "transaction" under section 274(b)(3)? If so, what steps, if any, must the BOC and its section 274 separated affiliate or electronic publishing joint venture take to comply with the requirements of section 274(b)(3) for purposes of CPNI?**

A BOC contacting its customers to seek approval to use CPNI to engage in activities in which the BOC is permitted to engage is not performing a service for or on behalf of its Section

274 affiliate or electronic publishing joint venture, but is contacting the customer on the BOC's own behalf. Accordingly, no "transaction" under 274(b)(3) has occurred.

**25. Please comment on any other issues relating to the interplay between sections 222 and 274.**

The Commission should confirm that a BOC may disclose CPNI to an affiliate without customer approval for the purpose of publishing a directory,<sup>55</sup> even if that directory is electronically published, without incurring an obligation to make such information available to other electronic publishers without customer approval. Further, subscriber list information that is provided to a BOC's directory publishing affiliate for purposes of an electronically published directory need only be made available to other persons for the purpose of publishing a directory.<sup>56</sup> The BOC is not obligated to make that information available to other electronic publishers generally. Thus, the fact that the BOC's affiliate is publishing a directory electronically does not create an obligation for the BOC to provide subscriber list information to all other electronic publishers, only to persons for the purpose of publishing a directory, which may be in electronic format.

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<sup>55</sup> 47 U.S.C. § 222(c)(1)(B).

<sup>56</sup> 47 U.S.C. §222(e).

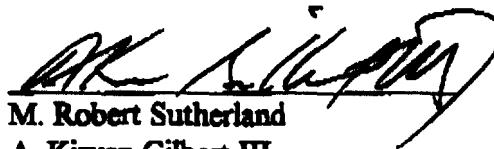
**26. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 274?**

The Commission need only affirm in whatever rules it adopts under Section 222 that those rules apply evenly to all carriers, including the BOCs, and that Section 274 imposes no special CPNI burdens on the BOCs.

Respectfully submitted,

BELLSOUTH CORPORATION

By Its Attorneys



M. Robert Sutherland  
A. Kirven Gilbert III

Suite 1700  
1155 Peachtree Street, N.E.  
Atlanta, Georgia 30309-3610  
(404) 249-3388

DATE: March 17, 1997

**CERTIFICATE OF SERVICE**  
**(CC Dkt 96-115)**

I hereby certify that I have this 17th day of March, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH FURTHER COMMENTS by placing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the parties on the attached service list.

  
\_\_\_\_\_  
Sheila Bonner

**CC DOCKET NO. 96-115**

Thomas E. Taylor  
Jack B. Harrison  
ATTORNEYS FOR CINCINNATI BELL  
TELEPHONE COMPANY  
FROST & JACOBS  
2500 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202

James D. Ellis  
Robert M. Lynch  
David F. Brown  
ATTORNEYS FOR  
SBC COMMUNICATIONS, INC.  
175 E. Houston, Room 1254  
San Antonio, TX 78205

Durward D. Dupre  
Michael J. Zpevak  
Robert J. Gryzmala  
SOUTHWESTERN BELL TELEPHONE COMPANY  
One Bell Center, Room 3520  
St. Louis, Missouri 63101

Saul Fisher  
Thomas J. Farrelly  
NYNEX TELEPHONE COMPANIES  
1095 Avenue of the Americas  
New York, NY 10036

Lawrence W. Katz  
THE BELL ATLANTIC TELEPHONE COMPANIES  
1320 North Court House Road  
Eighth Floor  
Arlington, Virginia 22201

Alan N. Baker  
Michael S. Pabian  
AMERITECH  
2000 West Ameritech Center Drive  
Hoffman Estates, IL 60196

Jonathan E. Canis  
VIRGIN ISLANDS TELEPHONE CORPORATION  
Reed Smith Shaw & McClay  
1301 K Street, N.W.  
Suite 1100 - East Tower  
Washington, D.C. 20005

Jay C. Keithley  
Leon M. Kestenbaum  
Norina T. Moy  
SPRINT CORPORATION  
1850 M Street, N.W.  
Suite 1110  
Washington, D.C. 20036

Craig T. Smith  
SPRINT CORPORATION  
P. O. Box 11315  
Kansas City, Missouri 64112

Kathryn Marie Krause  
U S WEST, INC.  
Suite 700  
1020 19th Street, N.W.  
Washington, D.C. 20036



Glenn S. Rabin  
ALLTEL CORPORATE SERVICES, INC.  
655 15th Street, N.W.  
Suite 200  
Washington, D.C. 20005

Mary McDermott  
Linda Kent  
Charles D. Cosson  
Keith Townsend  
UNITED STATES TELEPHONE ASSOCIATION  
1401 H Street, N.W., Suite 600  
Washington, D.C. 20005

Saul Fisher  
Thomas J. Farrelly  
NYNEX TELEPHONE COMPANIES  
1095 Avenue of the Americas  
New York, NY 10036

Michael J. Shortley, III  
FRONTIER CORPORATION  
180 South Clinton Avenue  
Rochester, NY 14646

Lucille M. Mates  
Sarah R. Thomas  
Patricia L. C. Mahoney  
PACIFIC TELESIS GROUP  
140 New Montgomery Street  
Room 1522A  
San Francisco, CA 94105

Margaret E. Garber  
PACIFIC TELESIS GROUP  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Richard McKenna  
GTE SERVICE CORPORATION  
600 Hidden Ridge  
Irving, Texas 75015

David J. Gudino  
GTE SERVICE CORPORATION  
1850 M Street, N.W.  
Suite 1200  
Washington, D.C. 20036

Paul Rodgers  
Charles D. Gray  
James Bradford Ramsay  
NATIONAL ASSOCIATION OF  
REGULATORY UTILITY  
COMMISSIONERS  
1201 Constitution Avenue, Suite 1102  
Post Office Box 684  
Washington, D.C. 20044

Assemblyman Anthony J. Genovesi  
Legislative Office Building  
Room 456  
Albany, NY 12248-0001

Peter Arth, Jr.  
Edward W. O'Neill  
Mary Mack Adu  
People of the State of California and the Public  
Utilities Commission of the State of California  
505 Van Ness Avenue  
San Francisco, CA 94102

Philip F. McClelland  
Irwin A. Popowsky  
PENNSYLVANIA OFFICE OF  
CONSUMER ADVOCATE  
Office of Attorney General  
1425 Strawberry Square  
Harrisburg, PA 17120

Jackie Follis,  
Senior Policy Analyst  
PUBLIC UTILITY COMMISSION OF TEXAS  
Office of Regulatory Affairs  
7800 Shoal Creek Boulevard  
Austin, TX 78757-1098

Albert H. Kramer  
Robert F. Aldrich  
AMERICAN PUBLIC  
COMMUNICATIONS COUNCIL  
DICKSTEIN, SHAPIRO & MORIN, L.L.P.  
2101 L Street, N.W.  
Washington, D.C. 20554

Albert Halprin  
Joel Bernstein  
YELLOW PAGES PUBLISHERS ASSOCIATION  
Halprin, Temple, Goodman and Sugrue  
1100 New York Avenue, N.W.  
Suite 650E  
Washington, D.C. 20005

Theodore Case Whitehouse  
Michael F. Finn  
ASSOCIATION OF DIRECTORY PUBLISHERS  
WILLKIE FARR & GALLAGHER  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036

Dennis C. Brown  
SMALL BUSINESS IN TELECOMMUNICATIONS  
Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006

Bradley Stillman, Esq.  
CONSUMER FEDERATION OF AMERICA  
1424 16th Street, N.W.  
Suite 604  
Washington, D.C. 20036

Danny E. Adams  
Steven A. Augustino  
THE ALARM INDUSTRY COMMUNICATIONS  
COMMITTEE  
KELLEY DRYE & WARREN, LLP  
1200 Nineteenth Street, N.W.  
Suite 500  
Washington, D.C. 20036

COMPUSERVE INCORPORATED  
5000 Arlington Centre Boulevard  
P. O. Box 20212  
Columbus, OH 43220

Randolph J. May  
Bonding Yee  
COMPUSERVE INCORPORATED  
SUTHERLAND, ASBILL & BRENNAN  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2404

Mark J. Golden  
Vice President of Industry Affairs  
PERSONAL COMMUNICATIONS  
INDUSTRY ASSOCIATION  
500 Montgomery Street  
Suite 700  
Alexandria, VA 22314-1561

Pamela Riley  
AIRTOUCH COMMUNICATIONS, INC.  
One California Street  
San Francisco, CA 94111

Judith St. Ledger-Roty  
Lee A. Rau  
PAGING NETWORK, INC.  
REED SMITH SHAW & McCLAY  
1301 K Street, N.W.  
Suite 1100 - East Tower  
Washington, D.C. 20005

Charles H. Helein  
AMERICA'S CARRIER'S TELECOMMUNICATION  
ASSOCIATION  
Helein & Association, P.C.  
8180 Greensboro Drive  
Suite 700  
McLean, Virginia 22102

Joseph P. Markoski  
Marc Berejka  
INFORMATION TECHNOLOGY  
ASSOCIATION OF AMERICA  
Squire, Sanders & Dempsey  
1201 Pennsylvania Avenue, N.W.  
P. O. Box 407  
Washington, D.C. 20044

David A. Gross  
Kathleen Q. Abernathy  
AIRTOUCH COMMUNICATIONS, INC.  
1818 N Street, N.W.  
Suite 800  
Washington, D.C. 20036

Carl W. Northrop  
Christine M. Crowe  
ARCH COMMUNICATIONS GROUP, INC.  
PAUL, HASTINGS, JANOFSKY & WALKER  
1299 Pennsylvania Avenue, N.W.  
10th Floor  
Washington, D.C. 20004-2400

Ann P. Morton, Esq.  
CABLE & WIRELESS, INC.  
8219 Leesburg Pike  
Vienna, Virginia 22182

Frank W. Krogh  
Donald J. Elardo  
MCI TELECOMMUNICATIONS CORPORATION  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

J. Christopher Dance  
Vice President, Legal Affairs  
Kerry Tassopoulos  
Director of Government Affairs  
EXCEL TELECOMMUNICATIONS, INC.  
9330 LBJ Freeway, Suite 1220  
Dallas, Texas 75243

Thomas K. Crowe  
EXCEL COMMUNICATIONS, INC.  
LAW OFFICES OF THOMAS K. CROWE, P.C.  
2300 M Street, N.W.  
Suite 800  
Washington, D.C. 20037

Mark C. Rosenblum  
Leonard J. Cali  
Judy Sello  
AT&T CORP.  
Room 3244J1  
295 North Maple Avenue  
Basking Ridge, NJ 07920

Genevieve Morelli  
Vice President and General Counsel  
THE COMPETITIVE TELECOMMUNICATIONS  
ASSOCIATION  
1140 Connecticut Avenue, N.W.  
Suite 220  
Washington, D.C. 20036

Danny E. Adams  
Steven A. Augustino  
THE COMPETITIVE TELECOMMUNICATIONS  
ASSOCIATION  
KELLEY DRYE & WARREN LLP  
1200 Nineteenth Street, N.W., Suite 500  
Washington, D.C. 20036

Charles C. Hunter  
TELECOMMUNICATIONS RESELLERS  
ASSOCIATION  
HUNTER & MOW, P.C.  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006

Catherine R. Sloan  
Richard L. Fruchterman  
Richard S. Whitt  
WORLDCOM, INC.  
d/b/a LDDS WORLDCOM  
1120 Connecticut Avenue, N.W., Suite 400  
Washington, D.C. 20036

Cindy Z. Schonhaut  
Vice President, Government Affairs  
INTELCOM GROUP (U.S.A.), INC.  
9605 East Maroon Circle  
Englewood, CO 80112

Albert H. Kramer  
Robert F. Aldrich  
INTELCOM GROUP (U.S.A.), INC.  
DICKSTEIN, SHAPIRO & MORIN, L.L.P.  
2101 L Street, N.W.  
Washington, D.C. 20554

Teresa Marrero  
Senior Regulatory Counsel  
TELEPORT COMMUNICATIONS GROUP, INC.  
One Teleport Drive  
Suite 300  
Staten Island, NY 10310

David N. Porter  
Vice President, Government Affairs  
MFS COMMUNICATIONS COMPANY, INC.  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Andrew D. Lipman  
Mark Sievers  
MFS Communications Company, Inc.  
SWIDLER & BERLIN, Chartered  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Herta Tucker  
ASSOCIATION OF TELEMESSAGING  
SERVICES INTERNATIONAL  
Executive Vice President  
1200 19th Street, N.W.  
Washington, D.C. 20036

Frank Moore  
Government Affairs Division  
ASSOCIATION OF TELEMESSAGING  
SERVICES INTERNATIONAL  
Smith, Bucklin & Associates, Inc.  
1200 19th Street, N.W.  
Washington, D.C. 20036

Linda T. Solheim  
General Counsel  
WIRELESS TECHNOLOGY RESEARCH, L.L.C  
2817-D South Woodrow Street  
Arlington, VA 22206

Charles C. Hunter  
TELECOMMUNICATIONS RESELLERS  
ASSOCIATION  
HUNTER & MOW, P.C.  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006

David Cosson, Esq.  
Steven E. Watkins  
NCTA  
2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Lisa M. Zaina, Esq.  
Ken Johnson  
OPASTCO  
21 Dupont Circle, N.W.  
Suite 700  
Washington, D.C. 20036

Gene P. Belardi  
Vice President  
MOBILEMEDIA COMMUNICATIONS, INC.  
2101 Wilson Boulevard  
Suite 935  
Arlington, VA 22201

Jonathan E. Canis  
Reed Smith Shaw & McClay  
INTERMEDIA COMMUNICATIONS, INC.  
1301 K Street, N.W.  
Suite 1100, East Tower  
Washington, D.C. 20005

J. Davil Haralson  
EQUIFAX, INC.  
1600 Peachtree Street, N.W.  
Atlanta, GA 30309

Andrew D. Lipman  
Pamela S. Arluk  
COUNSEL FOR EQUIFAX, INC.  
Swidler & Berlin, Chtd.  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

\*Janice M. Myles (2)  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 544  
Washington, D.C. 20554

\*ITS  
2100 M Street, N.W.  
Room 140  
Washington, D.C. 20037

\* Hand Delivery